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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 504

SAMUEL GALE,

Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

[illegible] S. Mason,
[illegible] Allen T. Parsons,
Counsel for Appellee.

NEW YORK COURT OF APPEALS

PEOPLE OF THE STATE OF NEW YORK

against

SAMUEL SAIA

(Four Cases Consolidated on Appeal)

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

MEMORANDUM IN OPPOSITION

Now comes the Appellee in opposition to the contentions of the Appellant and contends that there is no substantial jurisdictional question involved.

The cases here presented for consideration involve the alleged violation on four different occasions September 1st, September 8th, September 15th and September 22nd, 1946, of the City of Lockport Penal Ordinance No. 38, Sections 2 and 3 in that the Defendant did on the above dates at Outwater Park, a public park in the City of Lockport, maintain and operate on an automobile a radio device and loud speaker whereby the sound therefrom was cast directly on the streets and public places in said City of Lockport, New York. It was charged that the said radio device was maintained for the purpose of attracting the attention of the passing public and the people in said park, and the sounds

coming therefrom could be heard to the annoyance or inconvenience of travellers upon the street and the users of said public park and neighboring premises.

The basis of the charge in each case is that the said defendant violated the above mentioned ordinances in that he failed to obtain a permit or permission from the Chief of Police prior to using said radio device.

The ordinance in question is entitled "PROHIBITING UNNECESSARY AND UNUSUAL NOISES." Section 2 of the Ordinance reads:

> "Sec. 2. Radio devices, etc. It shall be unlawful for any person to maintain and operate in any building, or on any premises or on any automobile, motor truck or other motor vehicle, any radio device, mechanical device, or loud speaker or any device of any kind whereby the sound therefrom is cast directly upon the streets and public places and where such device is maintained for advertising purposes or for the purpose of attracting the attention of the passing public, or which is so placed and operated that the sounds coming therefrom can be heard to the annoyance or inconvenience of travellers upon any street or public places or of persons in neighboring premises."

Section 3 reads:

> "Sec. 3. Exception. Public dissemination, through radio loud speakers, of items of news and matters of public concern and athletic activities shall not be deemed a violation of this section provided that the same be done under permission obtained from the Chief of Police."

POINT I

The Defendant by His Actions Did Violate the City Penal Ordinance

The Defendant admitted on the trial of this case that he operated a loud speaker in a public place on four separate

occasions without first obtaining a permit from the Chief of Police. In addition to this testimony at the trial there was other evidence that the sound coming from this mechanical device was cast directly upon the streets, and that it could be heard to the annoyance or inconvenience of travellers upon public places or of persons in neighboring premises.

It seems obvious for purposes of this appeal, therefore, that there was evidence before the Trial Court upon which it could well find a violation of Section 2 of the said Ordinance, since the Defendant by his own testimony did not comply with the Exception as set forth in Sec. 3. It is further obvious that the Trial Court could well find the Defendant guilty of both Sections of the Ordinance in question, since the Trial Court had the opportunity to hear the testimony and observe the witnesses. This Court would be incorrect in reversing the Decision of the Trial Court on the facts unless the Decision was clearly against the weight of the evidence, and such situation certainly does not exist in this case.

Point II

The City Penal Ordinance Is Constitutional

The only real question before this Court upon this appeal is whether or not Lockport Penal Ordinance No. 38, Sections 2 and 3 is constitutional.

The City of Lockport by this Ordinance obviously does not deny the right of the Jehovah's witnesses to distribute literature on the streets, or to assemble in a public place to have a public meeting.

The United States Supreme Court cases together with the case of *State* v. *Barber*, 289 N. Y. 378 as cited by the Defendant are not on point in these cases.

In the case at Bar there is no prohibition of the activities of the Jehovah witnesses in distributing printed matter, or

preaching the Gospel of Jehovah, or having meetings in public places, but there is a prohibition simply as to the use of a radio loud speaker at said meetings so that the sounds therefrom are cast on public places without first obtaining a permit from the Chief of Police. This permit is not required for Jehovah witnesses alone but is required for all faiths and denominations and for all activities carried on in a public place within the said City of Lockport where it is intended to use a radio loud speaker.

The City of Montrose, Colorado, had an ordinance similar to the ordinance of the City of Lockport requiring a permit before loud speaking devices could be used within the city limits. In a case involving the violation of that ordinance the Supreme Court of the State of Colorado held as follows:

> "That the ordinance itself did not set up religious censorship. It is aimed solely at the prevention of noises that become nuisances. In the administration of the ordinance in the present case we see no attempt, overt or hidden, to over-ride constitutional guaranties. We believe the people of Montrose have the right to protect themselves from concentrated and continuous cacophony." *Hamilton* v. *City of Montrose,* 109 Co. 228, 124 Pac. 757.

The case above cited is on all fours with the case here being considered.

It is clearly within the police power of the city to so regulate the use of loud speaking devices, that the people of the city will not be subjected to continuous noise at all hours of the day and night and in public places. Such an ordinance is necessary to prevent conflicts and duplication in the use of these devices.

In the case of *Cox* v. *the State of New Hampshire,* 312 U. S. 569, Chief Justice Hughes upheld the right of a municipality to require a license before conducting a parade or

procession upon the public streets. In that case Justice Hughes stated that the Defendants had not been deprived of their right of freedom of worship, or freedom of speech, or freedom of assembly.

In the above cited case Chief Justice Hughes said:

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinion."

It is obvious that the prohibition set up in City Ordinances in question does not abridge constitutional liberty since it does not bear any necessary relationship to the freedom to speak, write, print or distribute information or opinion.

The Appellant contends that this restriction is a curb upon freedom of speech. Such contention if consistently carried to its ridiculous extreme could produce a chaotic situation. Based upon that premise a city could not in any way restrict the number of public devices used at any

one time or the volume thereof. With no regulations in force it would then be possible within a city the size of Lockport for thirty or forty of these radio devices to be in operation at one time in public places, and each one employing the greatest possible volume in order to drown out the others and attract the attention of the passing public to itself. If to attempt to impose restrictions and regulations upon the use of these devices is unconstitutional because it restricts freedom of speech, obviously such a situation as above depicted could be entirely possible. The question as to whether or not the Chief of Police in this case arbitrarily abused his discretion in refusing to grant the defendant a license is not properly before this Court. The Defendant takes the position that the ordinance in and of itself is unconstitutional. The Respondent in this case asserts that the city has just as much constitutional right to impose reasonable regulations on the use of noise making devices within the city limits as it does to enact zoning ordinances and regulating traffic. It is not aimed at the curtailment of constitutional liberties but simply imposes reasonable regulations on their exercise.

WHEREFORE the Appellee prays that the appeal herein be dismissed or that this Court refuse to entertain the appeal because of the lack of a fundamental or real jurisdictional issue.

Respectfully submitted,

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